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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIAN CHRISTOPHER THOMPSON, Defendant and Appellant.	E070503 (Super.Ct.No. RIF1605162) OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge. Affirmed with directions.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant and appellant, Brian Christopher Thompson, guilty as charged of a single count of committing a lewd or lascivious act on a child under the age of 14, namely, his stepdaughter, Jane Doe (Jane). (Pen. Code, § 288, subd. (a).) The charged lewd act occurred on July 19, 2016. Defendant was sentenced to the middle term of six years.

Defendant appeals, claiming: (1) the trial court abused its discretion in admitting evidence of uncharged sexual offenses that defendant previously perpetrated against Jane and her older sister, I.G. (Evid. Code, §§ 1108, 352);[1] (2) the matter must be remanded to the court to determine whether defendant qualifies for mental health diversion (Pen. Code, § 1001.36); (3) the court erroneously relied on improper aggravating factors, namely, defendant's lack of remorse and Jane's particular vulnerability, in selecting the middle term of six years; and (4) the court's records must be corrected to show that the court imposed a $500 fine pursuant to Penal Code section 288, subdivision (e), rather than pursuant to the inapplicable statute referenced in the court's sentencing minute order.

We affirm with directions. First, we find no abuse of discretion in the admission of any of the uncharged sexual offense evidence. We decline to remand the matter to determine whether defendant qualifies for mental health diversion (Pen. Code, § 1001.36) because, as the People argue, defendant is ineligible for mental health diversion given

[1] Undesignated statutory references are to the Evidence Code.

that he was currently charged with committing a lewd or lascivious act on a child under the age of 14 (Pen. Code, §§ 1001.36, subd. (b)(2)(D), 288, subd. (a)). We also decline to remand the matter for resentencing because the record shows that the court did not rely on any improper factors in selecting the middle term. We remand the matter with directions to prepare a supplemental sentencing minute order and a corrected abstract of judgment showing that the court imposed the $500 fine pursuant to Penal Code section 288, subdivision (e). In all other respects, we affirm the judgment.

II. FACTUAL BACKGROUND

A. *Jane's Family Background*

Defendant met his wife, E., in 2007, and they married in 2009. E. was previously married to another man, A.G., for 11 years; they divorced in 2007, several months before E. and defendant met. E. had four children from her marriage with A.G., a son and three daughters. E.'s oldest daughter, I.G., was born in 2001, and her youngest, Jane, was born in 2005. Defendant and E. also have a son together, J., who was born in 2011. Defendant was a father figure to E.'s three youngest children with A.G., including Jane. Jane called defendant "dad."

When defendant and E. married, defendant was working as an emergency medical technician, but he stopped working in late 2010 due to health issues. He was diagnosed with "many maladies," including schizoaffective disorder, for which he took medication. For years after he stopped working, including in 2016, defendant spent most of his time in bed or smoking marijuana. Defendant did not "participate in life very much" and did

not help E. with the household or the children. But it was not unusual for Jane and J. to hang out with defendant in defendant and E.'s bedroom.

B. *Defendant's July 19, 2016, Lewd Act Involving Jane*

On July 19, 2016, while E. was away from home at work, Jane was lying on the bed with defendant in defendant and E.'s bedroom, looking at houses on defendant's phone. J. was at the foot of the bed. Defendant placed his "open" hand "above" Jane's "private part" and "started . . . grabbing in a circular motion." Then he put his thumb under Jane's waistband, as if to pull her pants down. Jane said she had to use the bathroom, quickly left the bedroom, and did not return to the bedroom because she feared defendant would try to touch her that way again. Defendant stayed in his bedroom and did not follow Jane to the bathroom.

When E. returned home from work, Jane gave E. a "hug" and would not let her go, which was "extremely unusual." Defendant was still in his bedroom, and he asked E. if she would take him to buy cigarettes. E. said no because she had just worked all day. Defendant then went outside to the patio to smoke marijuana. When defendant was outside, Jane snuggled with E. on E.'s bed and said she wanted to speak with E. E. asked Jane what was going on, Jane looked at her, then looked at the French doors in E. and defendant's bedroom that led outside to the patio and said, "'Not here.'"

E. then walked with Jane to Jane's bedroom and closed the door. Jane began "sobbing uncontrollably" and told E. what defendant had done. Jane told E. that Jane was on defendant's bed with him, looking at a map on his phone, when he reached over,

"rubbed her crotch over her pants," then hooked his thumb into her waistband and tried to pull her pants down. Jane was "hysterical" as she described the incident to E.

E. told Jane to stay in her room and pretend she was sleeping. E. decided she would try to get defendant out of the house, so she offered to drive defendant to buy cigarettes, and he accepted the offer. E. drove defendant to a gas station where he bought cigarettes, then she drove defendant to a sheriff's substation. When they arrived at the station, E. told defendant he could tell E. the truth or he could tell "the cops" the truth, but she knew what had happened, and she believed Jane. She told defendant "this is a fucking wrap," meaning their relationship was over. E. turned on her cell phone recorder to record defendant, hoping he would admit what he had done, but he said he did not know what E. was talking about, and E. called 911.

C. *The Police Interviews*

A sheriff's deputy responded to E.'s 911 call, and E. spoke with the deputy. E. then went home and brought Jane back to the station, where the deputy interviewed Jane with another interviewer from child protective services. During the interview, Jane demonstrated how defendant had touched her that day, on July 19.

The deputy then interviewed defendant after defendant waived his *Miranda*[2] rights and agreed to speak to the deputy. Defendant denied touching Jane inappropriately. He said he was asleep when Jane claimed the incident occurred. He also said he was

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

schizophrenic and had post-traumatic stress disorder. Earlier on July 19, he used medical marijuana to help him sleep, and he had also taken cold and flu medication.

Defendant was arrested for the lewd act charge on July 19, 2016, following his interview at the sheriff's station. Several days later, E. petitioned for a divorce, and her divorce from defendant was final in January 2018. In March 2018, defendant was tried and convicted on the lewd act charge. Jane was 11 years old when the lewd act occurred and was 13 years old at the time of trial.

D. *The Prior Incidents Involving Defendant, Jane, and I.G.*

Over defendant's objection, the court admitted evidence that defendant committed or attempted to commit uncharged sex crimes against Jane and I.G., before he committed the alleged lewd act on Jane on July 19, 2016.

1. The Prior Incident Involving Jane

Sometime before the charged lewd act occurred on July 19, 2016, Jane was in a car with J. and defendant, sitting on defendant's lap in the driver's seat and pretending to drive, when defendant put his hand on Jane's "private part." Jane "felt like it wasn't right," but she thought it might be an accident, and she did not say anything to anyone about it at the time. But on July 19, 2016, Jane told E. about the incident in the car immediately after she told E. about what defendant did on July 19. Jane also described the incident in the car to the deputy during her July 19 interview.

2. The Prior Incidents Involving I.G.

I.G. was nearly age 17 at the time of trial in March 2018. I.G. testified that when she was 11 or 12 years old (around 2012 to 2013), she caught defendant watching her in the shower. He was standing "in the corner" with the shower curtain open. When I.G. turned and saw him, he "just stood there for a few more minutes," said "Oh, sorry," and then left.

Around the same time, when I.G. was 11 or 12 years old, defendant woke I.G. in the middle of the night one night and told her to meet him in the garage. They sat in his car, and he asked her about school and if she had any "crushes." He then leaned over the center console and asked I.G. if he could kiss her. I.G. told him she had to go to the bathroom, went back into the house, and slept in the closet.

Another time, when I.G. was 11 or 12 years old, she was in the car with defendant when she complained that her feet really hurt. Defendant offered to give her a foot massage when they returned home. Defendant gave I.G. a foot massage as she sat on the floor, wearing shorts. I.G. felt defendant's hand go higher and higher up her leg until he slid his thumb under her shorts. She felt his thumb rub the inner part of her thigh, then she jumped up and ran away.

Nearer to July 19, 2016, I.G. and defendant were alone in the house together. I.G. took a shower, and when she returned to her room, she saw a tablet propped up against a pillow in the corner. The tablet, which could record video, was not there before I.G. took her shower. I.G. had a "really weird feeling" about the tablet, and dressed herself in the

closet. Then defendant passed by her room, said, "Oh, is this my tablet?," grabbed the tablet, and walked out. The tablet had not been visible from the hallway. Looking back on these incidents, at the time of trial, I.G. believed defendant was trying to "groom" her.

The day after it happened, I.G. told E. about the incident in which defendant woke I.G. in the middle of the night, took her out to his car, and asked if he could kiss her. E. was not surprised because defendant had already told E. that he had woken in the car with I.G. and did not know what had happened. I.G. also told E. about the time defendant walked in on her in the shower. But that time, too, defendant had already told E. that he had accidentally walked in on I.G. in the shower. E. did not report either incident because, when the incidents occurred, she believed defendant's explanations.

E. *A.G.'s Prior Molestations of I.G. and Jane's "Visions" of A.G.*

E. testified that, in 2013, I.G. disclosed to E. that I.G.'s biological father, A.G., had "violently sexually assaulted" I.G. as far back as I.G. could recall, at least since I.G. was three years old. I.G. testified that A.G. began molesting her when she was in kindergarten. A.G. pled guilty to two counts of child molestation, including one count of committing a lewd act by force or fear (Pen. Code, § 288, subd. (b)), and was sentenced to 12 years in prison.

Following I.G.'s disclosure about A.G. in 2013, E. made it clear to her children that if someone touched them inappropriately, they should get away from the person and report the abuse. But E. did not tell her younger children, including Jane and J., the

details about what A.G. had done to I.G. Jane only knew that A.G. had done "something bad" and was not going to be around.

Jane had "visions" of watching I.G. and her other sister in a room; A.G. would walk in and was going to do something bad to Jane's sisters. Jane had these visions after she learned that A.G. had done "bad things" to I.G. Jane frequently had these visions and they made Jane feel frightened and nervous. Jane did not have visions of A.G. doing anything to herself personally.

F. *Defendant's Testimony*

Defendant testified in his own defense. On July 19, 2016, he was periodically taking an intravenous shot called Invega Sustenna to treat his schizoaffective disorder. That day, he also used medical marijuana and had an alcoholic drink mixed with a cold and flu medication to treat his summer cold. He used Indica, a type of marijuana he usually used at the end of the day because it made him drowsy. For these reasons, he felt "cloudy" and "under the weather," and he was slow in his responses during his interview.

On July 19, defendant was outside on the patio with J. and Jane; they were talking to a neighbor and looking at pictures of the family's former home on Google Maps. They were outside for an hour or two. Defendant then went to his bedroom, fell asleep in his bed, and was asleep from around 12:30 p.m. to 5:30 p.m., until after E. returned home from work. J. brought defendant a popsicle, and J. was with defendant when defendant fell asleep. Defendant did not recall Jane being in his bedroom at all that day. The last interaction defendant recalled having with Jane on July 19 was when they were on the

patio talking to the neighbors. When E. came home from work, defendant woke up in the bed with J.

Defendant did not believe he had done anything to Jane on July 19, 2016. He also denied touching Jane inappropriately while she was on his lap in a car, and he denied doing the things I.G. said he had done. The defense claimed that E. encouraged Jane and I.G. to fabricate their allegations against defendant because E. was frustrated with defendant and wanted to divorce him. Defendant also presented testimony negating the inference that he had never helped E. with the house or the children. When he and E. met in 2007, E. was unemployed and he was attending school. After he completed school, he worked as an emergency medical technician for around three years. For the first two and one-half years of their relationship, E. did not work and defendant supported the entire family, including E., her four children, and her parents who were living with the family. E. later worked, attended school, and began working as a family law paralegal in 2014.

III. DISCUSSION

A. *The Evidence That Defendant Committed Prior Uncharged Sex Offenses Against Jane and I.G. Was Properly Admitted (§§ 1108, 352)*

Defendant claims the court prejudicially erred in admitting the evidence that he committed or attempted to commit prior uncharged sex offenses, namely, one involving Jane and four involving Jane's older sister, I.G., before he committed the charged lewd act involving Jane on July 19, 2016. We find no abuse of discretion in the court's admission of any of the prior uncharged sex offense evidence. (§§ 1108, 352.)

1. Pretrial Proceedings

The People filed a motion in limine seeking to admit the evidence of defendant's prior uncharged sexual offenses or attempted sexual offenses against Jane and I.G. under section 1108. The defense filed a motion in limine to exclude all of the evidence on the grounds it was more prejudicial than probative under section 352. Before trial, the court ruled that all of the evidence was admissible.

2. Legal Principles and Standard of Review

In a criminal trial, evidence that the defendant has committed a prior bad act or offense is inadmissible to prove the defendant's conduct on a specific occasion or that the defendant has a disposition to commit such conduct or offense. (§ 1101, subd. (a); see *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) But this per se exclusionary rule does not apply when the defendant is charged with a sexual offense. (§§ 1101, subd. (a), 1108.) When a defendant is charged with a sexual offense, evidence that the defendant previously committed a sexual offense is admissible under section 1108 to show that the defendant has a disposition or propensity to commit sexual offenses, and is thus guilty of the charged sexual offense, unless the evidence is inadmissible under section 352. (*Falsetta*, *supra*, at p. 911.) Section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 352, in turn, provides: "The court in its discretion may exclude evidence if its probative

value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citation.]" (*Falsetta*, *supra*, 21 Cal.4th at p. 915.) "By removing the restriction on character [or propensity] evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

In sexual offense cases, section 352 gives trial courts "broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value." (*Falsetta, supra,* 21 Cal.4th at p. 919.) In determining whether to admit or exclude sexual offense evidence under sections 1108 and 352, the court must "engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a

defendant [has committed in the past], trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta*, *supra*, at p. 917.) "'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

Although the admission of prior sexual offense disposition evidence in sexual offense cases is subject to a careful weighing process under section 352, there is a presumption in favor of admitting the evidence. In enacting section 1108 in 1995, our Legislature determined that prior sexual offense evidence is "particularly probative" in sexual offense cases. (See *People v. Story* (2009) 45 Cal.4th 1282, 1293.) Thus, prior sexual offense evidence is "presumed admissible" in sexual offense cases "and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 132.)

A trial court's rulings admitting prior sexual offense evidence under sections 1108 and 352 are reviewed for an abuse of discretion. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824; *People v. Avila* (2014) 59 Cal.4th 496, 515.) The court's rulings will be upheld unless the court exercised its discretion "'in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

3. Analysis

(a) *The Uncharged Sexual Offense Evidence Was Sufficiently Reliable*

Defendant claims the court abused its discretion in admitting all of the evidence of his prior uncharged sexual offenses, or attempted sexual offenses, against Jane and I.G. because the girls' testimony was "highly unreliable." He points to the evidence that I.G. had been sexually abused by her biological father, A.G., and that this "trauma affected the entire family." I.G. underwent therapy for the abuse, and Jane had "visions" of A.G. coming into a room, intending to do "bad things" to I.G. and Jane's other older sister.

Given the family's history with A.G., defendant argues Jane's and I.G's testimony concerning the prior incidents involving defendant could have been "'cross-contaminat[ed].'" He also points out that there were no third party witnesses to the prior incidents, and no police reports of the prior incidents. E. also encouraged the girls to report any inappropriate touchings. Defendant relies on *People v. Saldana* (2018) 19 Cal.App.5th 432, 449, where a defense expert testified that "children in an unstable environment, unsupervised, needing attention, . . . who received positive reinforcement

for reporting molestation . . . are vulnerable to reporting things 'that simply didn't happen.'"

The "degree of certainty" that a prior sexual offense was committed is one of the factors the court must weigh in determining whether to admit or exclude prior sexual offense evidence under sections 1108 and 352. (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.) But here, the trial court reasonably could have determined that Jane's and I.G.'s initial reports and proffered testimony concerning the prior incidents or sexual offenses involving defendant was sufficiently reliable for the jury to find, based on a preponderance of the evidence, that each incident occurred. (See *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183-1186 [prior sexual offense must be proved by a preponderance of the evidence]; *People v. Hill* (2001) 86 Cal.App.4th 273, 278-279 [same].)

Jane reported the prior incident in which defendant touched her vaginal area in the car. She told E. and her interviewers about the incident on July 16, 2016, shortly after she told E. about the charged lewd act she claimed defendant committed against her that day. I.G. promptly reported two of the four prior incidents she claimed defendant perpetrated against her—the one in which defendant took I.G. to his car and asked if he could kiss her, and the one in which I.G. caught defendant watching I.G. in the shower. Defendant also promptly reported the same two incidents to E., and E. initially believed defendant's explanations that the incidents were innocent mistakes on defendant's part.

I.G. did not immediately report the other two incidents involving herself and defendant—the one in which defendant touched I.G.'s thigh above her shorts, or the one

in which I.G. found defendant's tablet in her bedroom while she was dressing. But I.G. testified she did not immediately tell E. about these incidents because she "was trying to tell [herself] that what was happening was okay because of what [she] had been through [with A.G.] [and she] didn't want to jump to any conclusions and ruin anything." In addition, there was no evidence that Jane and I.G. discussed any of the incidents with each other before they reported the incidents to E. Thus, the jury reasonably could have determined, based on a preponderance of the evidence, that the girls' reports and testimony was reliable and that the incidents did in fact occur.

(b) *The Jury Reasonably Could Have Determined That the Prior Incident Involving Jane Was a Sexual Offense*

Defendant claims the evidence that he touched Jane's vaginal area in the car, while Jane was sitting on his lap and pretending to drive, was erroneously admitted because the court found that the incident "was not sexual in nature."[3] In admitting the evidence, the court said: "I've considered, under [section] 352, bringing that in, and the explanation is that I don't think it's going to mislead or confuse the jury because the conclusion reached is that it was not sexual in nature. It was playful maybe, but it was not sexual, and that conclusion was reached by the victim and by her mother."

For purposes of Evidence Code section 1108, a "sexual offense" means a crime, including the charged conduct proscribed by Penal Code section 288, subdivision (a) (lewd or lascivious act on child under age 14), or an attempt to engage in such proscribed

[3] For this reason, defendant argues the evidence concerning the incident in the car was "not probative to any issue in the case."

conduct. (Evid. Code, § 1108, subd. (d)(1)(A), (F).) Contrary to defendant's argument, the court *did not find* that the incident in which defendant touched Jane's vaginal area in the car "was not sexual in nature." In stating that the incident "was not sexual in nature" or "was playful maybe," the court was merely saying that the evidence of the incident was not going to mislead or confuse the jury *because* the jury *could* view the incident as *not* sexual in nature, given Jane's initial impression that defendant accidentally touched her vaginal area in the car and defendant's denials that the incident was sexual in nature.[4]

Jane stated in her July 19 interview that she initially believed the incident in the car was a mistake or accident. Likewise, beginning with his July 19 interview, defendant "repeatedly and consistently denied he touched [Jane] inappropriately in the car." Given Jane's initial impression that the incident was an accident and defendant's denials, the jury reasonably could have concluded that the incident was a mistake and was not sexual in nature. But the jury *also* could have determined, based on a preponderance of the evidence, that the incident in the car *was* an intentional lewd act, given its proximity in time and similarity to the current lewd act charge involving Jane. (Pen. Code, § 288, subd. (a).)

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[4] The court was, however, mistaken when it indicated that Jane's mother, E., believed the prior incident in the car was not sexual in nature. E. never said she thought the prior incident in the car was not sexual in nature. E. did not learn of the incident until Jane disclosed it to her on July 19, 2016, after Jane told E. about the charged incident. Thus, when the court referred to the "conclusion . . . reached by [Jane] and by her mother," it must have been thinking of one of the incidents involving I.G., namely, when defendant took I.G. to his car in the middle of the night and asked if he could kiss her, or when I.G. saw defendant watching her in the shower. According to E., defendant told E. about these two incidents shortly after they occurred and claimed they were accidents, and E. initially believed defendant.

A court does not abuse its discretion in admitting evidence of a defendant's prior conduct if the jury could reasonably conclude, based on a preponderance of the evidence, that the conduct constituted a prior sexual offense. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 354-355.) Thus, we reject defendant's claim that the evidence of the incident in which defendant touched Jane's vaginal area in the car should have been excluded because it was not sexual in nature. The court did not abuse its discretion in admitting the evidence of the incident, given that the jury reasonably could have determined, based on a preponderance of the evidence, that the incident did in fact occur and constituted a prior sexual offense.

(c) *The Prior Incidents Involving I.G. Were Not More Inflammatory Than or Too Dissimilar to the Charged Lewd Act Involving Jane*

Defendant next claims the evidence of his conduct in each of the four prior incidents involving I.G. was more prejudicial than probative because these incidents were more inflammatory than and substantially dissimilar to the evidence of the charged lewd act involving Jane. We disagree on both counts.

First, none of the four incidents involving I.G. were more inflammatory than the evidence of the charged lewd act involving Jane. (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [evidence of prior sexual offenses no more inflammatory than charged offenses].) In incidents involving I.G., defendant (1) touched I.G.'s upper thigh under her shorts after massaging her feet; (2) woke I.G. in the middle of the night, took

her to his car, and asked if he could kiss her; (3) watched I.G. while she was naked in the shower; and (4) with his tablet, tried to video record I.G. getting dressed in her room.

But in the charged incident, defendant touched Jane's vaginal area with his "open" hand and "started . . . grabbing in a circular motion." Then he put his thumb under Jane's waistband, as if to pull her pants down. Thus, if anything, the charged lewd act was *more inflammatory* than any of the incidents involving I.G. Indeed, I.G. never claimed that defendant touched I.G.'s vaginal area with a sexual intent or attempted to remove I.G.'s pants or clothing.

Even so, defendant argues the incidents involving I.G. were more inflammatory than the charged incident because he was alone with I.G. when the attempted kissing and thigh massaging incidents occurred, but there was no evidence that he was alone with Jane, or that he made any effort to be alone with Jane, when the charged lewd act occurred. We are not persuaded. All of the evidence showed that, when defendant committed the lewd act with Jane, Jane's younger brother, J., was in the room, but J. was only five years old and no adults were present. Thus, when the charged lewd act occurred, Jane was just as alone and just as unprotected as I.G. was when defendant committed and attempted to commit the uncharged sexual offenses with I.G.

In a similar argument, defendant claims his prior conduct with I.G. was "entirely different" than his charged lewd act with Jane. He observes he was not charged with watching Jane in the shower or of attempting to take pictures of Jane while Jane undressed. Although dissimilarity is also a relevant factor for the court to consider in

determining whether to exclude evidence of a prior sexual offense (*People v. Loy* (2011) 52 Cal.4th 46, 63), "dissimilarity alone" does not "compel exclusion" of prior sexual offense evidence (*People v. Cordova, supra,* 62 Cal.4th at p. 133; see also *People v. Hernandez* (2011) 200 Cal.App.4th 953, 967 [concluding that "any dissimilarities in the alleged incidents relate[d] only to the weight of the evidence, not its admissibility."]).

All four of the prior incidents involving I.G. were sufficiently similar to the charged lewd act involving Jane to warrant admission. Both Jane and I.G. were ages 11 to 12 when defendant first committed or attempted to commit sexual offenses against them, although I.G. was 15 years old when defendant tried to video record I.G. getting dressed. All four of the prior incidents involving I.G. supported a logical inference that defendant had a propensity to commit sexual offenses against young girls, given the opportunity.[5]

[5] The parties agreed to instruct the jury with CALCRIM No. 375 (Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.), instead of CALCRIM No. 1191A (Evidence of Uncharged Sex Offense). Thus, the jury was not instructed that it could conclude from the uncharged offense evidence that "defendant was disposed or inclined to commit sexual offenses." (CALCRIM No. 1191A.) Instead, the jury was instructed that it could consider the uncharged offense evidence for the limited purpose of determining whether defendant "acted with the intent to commit a lewd or lascivious act on Jane," "had a motive to commit the [alleged] offense[]," and whether defendant's "alleged actions were not the result of mistake or accident." CALCRIM No. 375 also told the jury that it "may consider" the uncharged offense evidence "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged acts."

(d) *The Prior Incidents Involving I.G. Were Properly Admitted Even Though Defendant Was Not Convicted of a Crime Nor Punished Based on Any of the Incidents*

Defendant further argues that the evidence of the prior incidents involving I.G. should have been excluded because he was not charged or convicted of a crime or punished based on any of the incidents. "[T]he prejudicial impact" of prior sexual offense evidence "is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses . . . ." (*Falsetta*, *supra*, 21 Cal.4th at p. 917; *People v. Balcom* (1994) 7 Cal.4th 414, 427.) But this does not mean that evidence of a defendant's uncharged sexual offenses must always be excluded under section 352. (*Falsetta*, *supra*, at p. 919; *People v. Soto* (1998) 64 Cal.App.4th 966, 991 [uncharged sexual offense evidence properly admitted based on its similarity to and proximity in time to the charged offense, and it is "extremely probative of [the defendant's] sexual misconduct when left alone with young female relatives . . . ."].)

As discussed, defendant's prior uncharged sexual offenses and attempts to commit sexual offenses with I.G. was not more inflammatory than and was sufficiently similar to the charged lewd act against Jane to warrant its admission. In addition, the evidence was highly probative of defendant's propensity to commit sexual offenses against young girls,

given the opportunity. Thus, the court did not abuse its discretion in admitting the evidence to show that defendant had a propensity to molest young girls.[6]

B. *Defendant Is Ineligible for Pretrial Mental Health Diversion (Pen. Code, § 1001.36) Because He Was Currently Charged With Committing a Lewd Act Offense*

Defendant claims the judgment must be conditionally reversed and the matter remanded to the trial court to determine whether he qualifies for pretrial mental health diversion under Penal Code section 1001.36. The statute, which was enacted effective June 27, 2018 (Stats. 2018, ch. 34, §§ 24, 37), allows the court to grant "pretrial diversion" to a defendant who suffers from a diagnosed and qualifying mental disorder (Pen. Code, § 1001.36, subds. (a), (b)(1)(A)) and who meets the statute's other eligibility requirements (*id*., subd. (b)(1)(B)). Defendant claims the statute applies retroactively to defendants, like himself, whose cases were not final on appeal when the statute went into effect on June 27, 2018. Defendant was convicted in March 2018 and sentenced in May 2018. The People claim the statute applies only prospectively to persons who were not tried, convicted, and sentenced before June 27, 2018.

The Court of Appeal is currently divided on whether Penal Code section 1001.36 applies retroactively, and our Supreme Court is reviewing the question. (*People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220.) In *Frahs*, Division Three of this court concluded that Penal Code section 1001.36 confers "an 'ameliorating

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[6] Our conclusion is unaffected by the parties' agreement, following the close of the evidence, to instruct the jury pursuant to CALCRIM No. 375, rather than CALCRIM No. 1191A. See footnote 5, *ante*.

benefit' to have the opportunity for diversion—and ultimately a possible dismissal" which applies retroactively to cases that were not final on appeal on June 27, 2018. (*People v. Frahs*, *supra*, at pp. 790-792.) In May 2019, the Fifth District issued a decision disagreeing with *Frahs*, holding in *People v. Craine* (2019) 35 Cal.App.5th 744 that "[Penal Code] section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." (*Id.* at p. 760.) Then, in July 2019, the Sixth District issued its decision in *People v. Weaver* (2019) 36 Cal.App.5th 1103, agreeing with *Frahs* and concluding that Penal Code section 1001.36 applies retroactively. (*People v. Weaver*, *supra*, at pp. 1113-1122.) We agree with the reasoning of *Frahs* and *Weaver*, and conclude that Penal Code section 1001.36 applies retroactively to cases, like defendant's, which were not final on appeal when the statute was enacted effective June 27, 2018.

But, as the People claim, defendant is ineligible for pretrial diversion because he was currently charged with committing a lewd or lascivious act on a child under 14 years of age. Penal Code section 1001.36 was amended, effective January 1, 2019, to provide that persons charged with certain offenses, including a lewd or lascivious act on a child under 14 years of age, "may not be placed into a diversion program" under the statute. (Pen. Code, § 1001.36, subd. (b)(2)(D); Stats. 2018, ch.1005, § 1.)

Defendant claims the January 1, 2019-effective amendment to Penal Code section 1001.36 is not retroactive, because if it was, it would violate the state and federal Constitutions' prohibitions against ex post facto laws. (Cal. Const., art. I, § 9; U.S.

Const., art. I, §§ 9, 10.) We disagree. Division One of this court recently determined that the January 1, 2019-effective amendment to Penal Code section 1001.36 does not violate the constitutional prohibitions against ex post facto laws. (*People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053-1054.)

As the *Cawkwell* court explained: "'A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it was committed.' [Citation.] The ex post facto prohibition ensures that people are given 'fair warning' of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed. [Citation.]" (*People v. Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.)

When defendant committed the charged lewd act offense on July 16, 2016, the possibility of being placed in a pretrial mental health diversion program did not exist. Penal Code section 1001.36 was not enacted until June 27, 2018, nearly two years later. Thus, defendant could not have relied on the possibility of receiving pretrial mental health diversion in lieu of punishment when he committed the charged lewd act offense.

Additionally, "the Legislature's amendment of [Penal Code] section 1001.36 to eliminate eligibility for defendants charged with sex offenses did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which [defendant] was charged. [Citation.] That is, [defendant] was subject to the same punishment when he committed his offenses as he was after the

Legislature narrowed the scope of defendants eligible for diversion. Thus, the amendment does not violate the ex post facto clauses of the state or federal Constitutions, and [defendant] is ineligible for mental health diversion." (*People v. Cawkwell, supra,* 34 Cal.App.5th at p. 1054.)

C. *The Court Did Not Rely on Any Improper Factors in Selecting the Six-year Midterm*

Defendant claims the matter must be remanded for resentencing because the court relied on two improper aggravating factors—the victim, Jane's, "particular vulnerability" and defendant's apparent lack of remorse and "conspiracy" defense at trial—in sentencing defendant to the midterm of six years on his lewd act conviction. We conclude that the court *did not rely* on defendant's lack of remorse or his defense at trial, but properly relied on Jane's "particular vulnerability" in selecting the midterm. Thus, we reject this claim of sentencing error.[7]

1. Relevant Background

The probation department recommended that defendant be placed on probation for 36 months or, in the alternative, be sentenced to the low term of three years, on his lewd act conviction. (Pen. Code, § 288, subd. (a).) In support of granting probation, the

[7] The People claim defendant has forfeited his claim of sentencing error by failing to object that the court was relying on improper factors in imposing the middle term. (See *People v. Scott* (1994) 9 Cal.4th 331, 353-354 [waiver or forfeiture doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices," but does not apply when the court imposes an "unauthorized sentence."].) Even if defendant forfeited his claim of sentencing error, we consider the claim on its merits because it affects defendant's substantial rights. (Pen. Code, § 1259; *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [appellate court has discretion to address a party's forfeited claim of sentencing error].)

probation report outlined several factors: (1) defendant was 38 years old and did not have a prior criminal record; (2) the nature and circumstances of the crime were less serious than other instances of the same crime; (3) defendant appeared to have been a contributing member of society, although he was unable to continue his employment due to his mental health disorder; (4) he did not appear to pose a threat to society; (5) he appeared to be willing and able to abide by the terms of probation, should it be granted; (6) he had a positive support system and was taking his medications; and (7) he had a low risk of recidivism.

In support of imposing the low term, the probation report cited defendant's lack of a serious criminal history and the fact that the nature of the lewd act offense was less serious compared to other lewd act offenses.

At sentencing, the court explained that it was not placing defendant on probation, "primarily because of the victim Jane's vulnerability" and defendant's "apparent lack of remorse."[8] The court also said it had initially been inclined to impose the low term of three years. In discussing the low term, the court agreed that the lewd act against Jane was "less serious" than other lewd acts the court had seen; defendant had no serious criminal history; he "otherwise seem[ed] to be a pretty good citizen"; he had a lot of support in the community; he was not "super-aggressive"; and he had a mental condition "that lessened his culpability."

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[8] The vulnerability of the victim, and whether the defendant is remorseful, are proper factors for the court to consider in deciding whether to grant or deny probation. (Cal. Rules of Court, rule 4.414(a)(3) [victim vulnerability], (b)(7) [whether defendant is remorseful].) All further references to rules are to the California Rules of Court.

But the court also said it "ke[pt] coming back to the vulnerability of this family," referring to A.G.'s prior sexual abuse of I.G., and noted that defendant "totally" knew about the family's vulnerability when he committed the lewd act against Jane. The prosecutor expressly urged the court to impose the middle term of six years for the same reasons it denied probation: (1) Jane was "particularly vulnerable" (rule 4.421(a)(3)) and (2) defendant lacked remorse.

The prosecutor argued: "[N]ot only [was] . . . the defendant . . . not remorseful, [he] was not remorseful during trial when he testified, but he still was not remorseful after the jury convicted him, when he had another chance at realizing, acknowledging, and even apologizing for his conduct. [¶] Instead, not only did he say he was railroaded, but he also, again, brought back the allegation that the family made against [A.G.] . . . suggesting that they were also false and that somehow this family was accusing both of them wrongfully. It is offensive that he still does not wish to acknowledge responsibility and be accountable for what he has done." The prosecutor further argued: "[T]he defendant's lack of remorsefulness and the fact that he took advantage of this family and that he still accuses this family for something that he has done, goes against factors of mitigation, in my opinion."

In response to the prosecutor's argument, defense counsel reminded the court that, during his interview with the sheriff's deputy on July 19, 2016, defendant "was hesitant to call [Jane] a liar" because he did not know "what could have happened" while he was sleeping that day. Defense counsel argued that all defendant could say was, not that he

did not do what Jane said he did, but if he did, it was the result of him being in the state he was in at the time, that is, heavily medicated and sleeping.

In response to defense counsel's argument, the court said, it was "disturbed" because defendant had "gone from" taking that position in his interview to claiming he was "being railroaded. It's a conspiracy." The court noted that the defense had called A.G. to testify, who denied he perpetrated any crimes against I.G., "leaving one with the impression that it's the family making stuff up . . . ."

The court also characterized defendant as having claimed that "any man that steps foot into that house is going to go to prison because they will be necessarily accused of and found guilty of being sexual perpetrators on children. That . . . is a denial . . . not just a denial that it happened, but putting the proverbial ball in the court of the victim's family, to say to them, you're making all of this stuff up, not just as to me, but also as to [A.G.] *That's why I'm torn*." (Italics added.)

The court continued: "Your client has no criminal history. He's got—it seems like the whole city . . . is ready to support him. . . . I read from the letters. And he's not a super-aggressive individual. . . . But, yet, it's just hard for me to fathom that a household of young women and a mother would conspire to bring down and place into state prison a couple [of] different gentlemen. *That's why I'm struggling*." (Italics added.)

The court then concluded, however, that the aggravating and mitigating factors were "in balance" and sentenced defendant to the middle term of six years. The court stated: "The factors in mitigation would be [defendant] . . . has no real criminal record.

[(Rule 4.423(b)(1).)] The factors in aggravation is that this victim was particularly vulnerable. [(Rule 4.421(a)(3).)]" The court did not expressly state that it had considered defendant's lack of remorse or his "conspiracy" defense as factors in aggravation, or as grounds for selecting the midterm over the low term.

2. Applicable Legal Principles and Standard of Review

Penal Code section 1170, subdivision (b) governs the trial court's discretion in selecting a determinate sentence. It provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, . . . statements in aggravation or mitigation . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (Pen. Code, § 1170, subd. (b).)[9]

On appeal, we review a trial court's sentencing decision for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with

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[9] "Prior to the enactment of [Senate Bill No.] 40 on March 30, 2007, the middle term was the presumptive term, and was the required term unless outweighed by mitigating or aggravating factors. Since 2007 any of the three terms may be imposed 'within the sound discretion of the trial court.' ([Pen. Code,] § 1170[, subd.] (b).) The upper or lower term may be imposed without the need to find any specific facts, or that the mitigating or aggravating factors outweigh the other. The court must merely 'set forth on the record the reasons for imposing the term selected . . . .'" (Couzens, Bigelow & Prickett, Sentencing California Crimes (The Rutter Group 2018) § 12.4, p. 12-3.)

the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*Ibid.*; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) The court will abuse its discretion if, in choosing among the low, middle, and upper terms, it relies upon "circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval*, *supra*, at p. 847.)

3. Analysis

As indicated, defendant claims the court erroneously relied on Jane's "particular vulnerability," defendant's lack of remorse, and defendant's "conspiracy" defense at trial, in selecting the middle term of six years over the low term of three years. We find no abuse of discretion in the court's selection of the middle term.

(a) *The Court Properly Relied on Jane's Particular Vulnerability*

We begin with the court's reliance on Jane's particular vulnerability in selecting the middle term. (See rule 4.421(a)(3) ["[c]ircumstances in aggravation" include the factor that the "victim was particularly vulnerable."].) As noted, the court ultimately concluded that "the factors in aggravation and the factors in mitigation" were "in balance" and effectively found that Jane's particular vulnerability was the only factor in aggravation. Defendant claims Jane's particular vulnerability was an improper sentencing or aggravating factor. We disagree.

Relying on *Cunningham v. California* (2007) 549 U.S. 270, defendant correctly argues that "[t]he law prohibits the use of an element of the charged offense, essential to

a jury's determination of guilt, as an aggravating factor which would justify an upper term." (See *id*. at pp. 288-289.) He also correctly points out that, "where, as here, an age range factor is an element of the offense, vulnerability based on age is generally not a proper aggravating factor. [Citations.]" (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680.)

But the court *did not find* that Jane was particularly vulnerable because she was 11 years old, or under age 14, when defendant committed the charged lewd act. (Pen. Code, § 288, subd. (a) [criminalizing lewd or lascivious act on a child under age 14].) Instead, the court found Jane was particularly vulnerable because of what her family had experienced as a result of A.G.'s prior molestations of I.G. The court's "particular vulnerability" finding had nothing to do with Jane's age; it was based on Jane's emotional vulnerability due to A.G.'s prior molestations of I.G. As such, it was an appropriate finding, and it did not constitute an improper dual use of facts. (See *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1102-1103.)[10]

[10] Defendant further argues that Jane was not particularly vulnerable, or more vulnerable than the average child subjected to a lewd act, but was, rather, "more aware and able to protect herself because of her family's experiences. In fact, she immediately left the bedroom and told her mother as soon as she came home." But the court did not abuse its discretion in finding that Jane was *nevertheless* particularly vulnerable due to her family's prior experiences with A.G. Indeed, the finding was "not so arbitrary or irrational that no reasonable person could agree with it." (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1182.)

(b) *The Court Did Not Rely on Defendant's Lack of Remorse or His "Conspiracy" Defense in Selecting the Middle Term*

Defendant further argues, and the People concede, that a defendant's lack of remorse is not a proper aggravating factor when the defendant denies committing the crime and the evidence of guilt is not overwhelming. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319; *People v. Key* (1984) 153 Cal.App.3d 888, 900.) Here, defendant's lack of remorse was not a proper factor for the court to consider in imposing sentence. Defendant denied committing the charged lewd act against Jane. He claimed he did not know what happened while he was asleep, and he denied touching Jane with a sexual intent. For the same reasons, the evidence of defendant's guilt was not overwhelming.

Nonetheless, the People claim, and we agree, that defendant has not shown that the court relied on defendant's lack of remorse in imposing the middle term. Although the People concede "it is clear" that the court relied on defendant's lack of remorse in denying probation, they point out that the court did not "ultimately" cite defendant's lack of remorse as an aggravating factor, or as a factor in selecting the middle term. Indeed, at the conclusion of the sentencing hearing, the court said: "I told you what my tentative was . . . to go low term, three [years]. I am starting to think that, on balance, the factors in aggravation and the factors in mitigation are in balance. *The factors in mitigation would be [defendant] . . . has no real criminal record. The factors in aggravation is that this victim was particularly vulnerable.*" (Italics added.)

Thus, the record shows that the court did not rely either on defendant's lack of remorse, or on the related issue of his "conspiracy" defense, in selecting the middle term. To be sure, shortly before the court selected the middle term, it said it was "torn" and struggling" about its tentative decision to impose the low term because of defendant's lack of remorse and "conspiracy" defense. But ultimately, the court did not rely on either of these factors in selecting the middle term. (See *People v. Shenouda* (2015) 240 Cal.App.4th 358, 371-372.)

D. *The Court's Sentencing Records Must Be Corrected Regarding the $500 Fine*

At sentencing on May 11, 2018, the court orally imposed a $500 fine pursuant to Penal Code section 288, subdivision (e). But the court's minute order for that date shows that the court ordered defendant to pay a $500 fine "including penalty assessment" and cites Health and Safety Code section 11372.7. The abstract of judgment does not reflect the $500 fine at all.

Defendant claims the court's sentencing records must be corrected to show that the $500 fine was imposed pursuant to Penal Code section 288, subdivision (e), rather than Health and Safety Code section 11372.7. The People do not oppose this request. Courts have inherent authority to correct clerical errors in court records. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Additionally, conflicts between the court's oral pronouncements and its minute order are presumed clerical and are generally resolved in favor of the oral pronouncement. (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 744.)

Given the error in the May 11, 2018, sentencing minute order, it is necessary to remand the matter with directions to the court to issue a new and supplemental sentencing minute order, stating that the May 11, 2018, sentencing minute order incorrectly states that the $500 fine was imposed pursuant to Health and Safety Code section 11372.7, and was instead imposed pursuant to Penal Code section 288, subdivision (e). Although the current abstract of judgment does not reference the $500 fine at all, in an abundance of caution, we further direct the court to prepare an amended abstract of judgment showing, on page 2, under paragraph 13, titled "other orders," that the court imposed a $500 fine pursuant to Penal Code section 288, subdivision (e).

IV. DISPOSITION

The matter is remanded to the trial court with directions to prepare a supplemental sentencing minute order, and a corrected abstract of judgment, showing that the court imposed a $500 fine pursuant to Penal Code section 288, subdivision (e), rather than pursuant to Health and Safety Code section 11372.7. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

RAMIREZ
P. J.

MILLER
J.